THE ATTORNEY GENERAL OF TEXAS

AUSTIN 11, TEXAS

PRICE DANIEL
ATTORNEY GENERAL

Opinion
M-278

October 15, 1952

Hon. Allan Shivers
Governor of Texas
Austin, Texas

Opinion No. V-1531

Re: Legality of write-in votes for presidential and vice-presidential nominees of a political party where their names are written in under some column other than that of the party which nominated them.

Dear Governor Shivers:

In your letter requesting an opinion of this office on the questions submitted, you state:

"A great many Texas Democrats have expressed to me their desire to vote for Dwight D. Eisenhower and Richard Nixon for President and Vice President, respectively, if they could do so under the Democratic ticket. They have asked whether there is any manner in which this can be done, legally and honorably. The question also has been raised by the Texas Democrats for Eisenhower organization.

"I am attaching hereto a letter from Honorable Claud H. Gilmer, Chairman of the Texas Democrats for Eisenhower, and request that you give me an opinion on the legal questions presented therein."

The questions presented are:

"1. Is it legal to write in the names of Eisenhower and Nixon in the special "write-in" column provided on the general election ballot, and will such votes be counted for the Eisenhower and Nixon Republican electors in such cases?

"2. Is it legal for Democratic voters who want to vote for Eisenhower and Nixon electors on the Democratic ticket to strike out Stevenson and Sparkman and write in their place the names of Eisenhower and Nixon?

"3. Will votes which are so cast (under 2 above) be counted for the Eisenhower and Nixon Republican electors now on file with the Secretary of State, and must election judges count them the same as if they were voted in some other column?

"4. Must 'write-in' votes for president and vice president contain both names in full and be properly spelled, or is it satisfactory to write simply the last names 'Eisenhower and Nixon'?"

We shall answer these questions first with reference to printed or paper ballots. As hereinafter shown, a different law applies to voting machines. As to voting on printed or paper ballots, Section 62 of the Election Code (Art. 6.06, Vernon's Election Code) provides as follows:

" . . . when [a voter] shall desire to vote a mixed ticket he shall do so by running a line through the names of such candidates as he shall desire to vote against in the ticket he is voting, and by writing the name of the candidate for whom he desires to vote in the blank column and in the space provided for such office; same to be written with ink or pencil, unless the names of the candidates for which he desires to vote appear on the ballot, in which event he shall leave the same not scratched."

The foregoing statute has been held to be directory and therefore does not provide the only means for voting a "split ticket" or for casting a "write-in" vote.

In Moore v. Plott, 206 S.W. 958 (Tex. Civ. App. 1918), the court held that Section 62 is merely directory as to the place where the write-in candidate's name is to appear on the ballot, and that the name may be written in under a party column rather than under the write-in column. Huff v. Duffield, 251 S.W. 298 (Tex. Civ. App. 1923) also held that this statute is directory and that write-in votes for a candidate whose name is printed on the official ballot should be counted for him. As said in Moore v. Plott, the prime object of the election laws is to "promote the free and fair expression of the popular will, and to insure the purity and honesty of the ballot." If the will and intention of the voter can be determined, the expression of his choice should be given effect even though he has failed to comply strictly with statutory provisions. State ex rel. Millican v. Phillips, 63 Tex. 390 (1885); Fowler v. State, 68 Tex. 30, 3 S.W. 255 (1887); Wright v. Marquis, 255 S.W. 637 (Tex. Civ. App. 1923).

Similar holdings with respect to the validity of write-in votes have been made in other jurisdictions which have adopted the same view as that adopted in Texas in holding that election statutes should be liberally construed so as not to disfranchise a voter and prevent the expression of his will where his intention can be ascertained from the ballot as he has marked it. Shaw v. Stewart, 175 Neb.

315, 212 N.W. 760 (1927); Frothingham v. Woodside, 122 Me. 525, 120 Atl. 906 (1923); State v. Smith, 106 W. Va. 544, 146 S.E. 378 (1929).

The effect of these cases is that the voter may reject a candidate under the printed listing of his name on the ballot and nevertheless cast a valid write-in vote for him in another column. The cases discussed above indicate that the voter need not abide by the candidate's party affiliation and vote for the candidate only under that party column. He may vote for the candidate either under the candidate's party column or under any other column on the ballot. The cases also hold that the votes cast for a candidate in different columns should be cumulated in determining the total votes which he received. Also see People v. Smith, 43 N.W.2d 871 (Mich. Sup. 1950).

These decisions clearly establish that write-in votes for a candidate for an office filled directly by the voters should be counted for the candidate, whether the name is written in under the write-in column or under some party column other than that of the party which nominated him.

We then come to the question of whether the same rule obtains for votes cast for presidential electors where the short-form presidential ballot is used, whereby the voter does not vote directly for the electors but indicates his choice of electors by voting for party nominees for President and Vice-President.

Texas is one of some twenty-odd States which have adopted the short-form presidential ballot.[1] Section 61 of the Election Code (Art. 6.05, Vernon's Election Code) provides:

> " . . . When presidential electors are to be voted upon their names shall not appear on the official ballot, but the names of the candidates for President and Vice-President, respectively, of the political parties, as defined in the law, shall appear at the head of their respective tickets, printed as one race, and the votes for presidential electors of the various parties shall be canvassed, counted, and returns made in accordance with Sec. 171 and 172. . . ."

Section 171 (Art. 11.02, Vernon's Election Code) reads:

1/ See Ray v. Blair, 72 S.Ct. 654, 661 (1952).

> "A vote for the candidates of any political party for both President and Vice-President of the United States shall be conclusively deemed to be a vote for candidates of the same party for Presidential electors, and shall be so counted and recorded for such electors as the State shall be empowered to elect."

Section 172 (Art. 11.03, Vernon's Election Code) contains a similar provision with respect to the canvass of votes for presidential and vice-presidential candidates.

Although not made legally obligatory, it is assumed in States which have adopted the short-form ballot that electors will cast their votes in the electoral college for the presidential and vice-presidential nominees of the party which nominated them as candidates for elector. This assumption is based on long-standing experience of over 150 years.

In McPherson v. Blacker, 146 U.S. 1, 36 (1892), the Supreme Court of the United States recognized the force of this assumption in the following statement:

> "Doubtless it was supposed that the electors would exercise a reasonable independence and fair judgment in the selection of the chief executive, but experience soon demonstrated that, whether chosen by the legislatures or by popular suffrage on general ticket or in districts, they were so chosen simply to register the will of the appointing power in respect of a particular candidate." (Emphasis added.)

In State v. Pettijohn, 107 Kan. 447, 194 Pac. 328 (1920), the court said:

> " . . . As is well understood, a presidential elector was originally expected to exercise his own judgment in casting his vote as a member of the electoral college. He is now regarded as a mere representative of his party, selected to voice its choice in the matter. The voting for a list of presidential electors is with the vast majority a mere form, by which they seek to give expression to their preference for the offices of President and Vice President, being utterly indifferent as to the persons through whom legal effect is to be given to their action. . . . "

And in the recent case of Ray v. Blair, 72 S. Ct. 654, 661 (1952), the Supreme Court of the United States again recognized that

in the minds of the voters the presidential electors are "expected to support the party nominees."

The expectation of the voter in voting for presidential electors is that they will cast their vote for a particular set of candidates for President and Vice-President. Likewise, the expectation and intention of the voter in voting for a set of candidates on the short-form ballot is that his vote will assist in bringing about the election of the set of presidential electors who will vote for those candidates in the electoral college.

It cannot be questioned that a voter who writes in the names of a set of presidential candidates desires those persons to be elected to the offices of President and Vice-President. Neither can it be doubted that the voter's intention is to have his vote counted for the set of electors who will bring about their election. The argument that by voting for the candidates in some column other than that of the party which nominated them the voter is rejecting the electors of that party ignores the indisputable fact that the voter's ultimate interest is only in the election of a President and Vice-President and that he is "utterly indifferent as to the persons through whom legal effect is to be given" to his action in voting for the presidential and vice-presidential candidates. State v. Pettijohn, supra.

The language of Section 171 of the Election Code does not prevent votes for a set of candidates in a party column other than that of the party which nominated them from being counted for the electors of the nominating party. This statute does not state that the vote must be cast in that party's column. What it does is to make a vote for a set of candidates carry with it a vote for the presidential electors who are understood to have pledged themselves to vote for those candidates. The candidates for presidential electors are thereby linked with the candidates of a political party, not with the party itself. We do not think Sections 171 and 172 require that the vote be cast in any particular party column before it could be counted. As we have seen, the general rule in this State is that a ballot should be counted wherever the will of the voter can be ascertained unless there is an express statutory prohibition against counting it. Sections 171 and 172 contain no such prohibition. In other races the voter has the privilege of expressing his choice in any party column he chooses, and we find no reason for denying him the same privilege in voting for presidential electors.

In view of the foregoing, we are of the opinion that a write-in vote for a set of presidential and vice-presidential nominees should be counted as a vote for the electors of the party which nominated them, regardless of whether the names of the nominees

are written in under some other party column or under the write-in column on the ballot. Accordingly, each of your first three questions is answered in the affirmative.

In answering these questions it has been assumed that the voter has otherwise marked his ballot so as to show his intention to vote for the presidential and vice-presidential nominees whose names he has written in, either by scratching the names of other nominees or by failing to place an "X" in the box by the names of any other set of candidates.

In your fourth question you ask whether write-in votes for President and Vice-President must contain both names in full and be properly spelled, or whether the voter may write simply the last names "Eisenhower and Nixon."

Section 171 of the Election Code provides that a vote for the candidates for both President and Vice-President shall be deemed to be a vote for candidates for presidential electors. Section 61 provides that the names shall be printed as one race. In view of these statutory provisions, it is our opinion that the voter must write in the names of both the presidential and the vice-presidential candidate in order for his ballot to be counted. Consequently, the voter must write in the names of both Eisenhower and Nixon in order for his ballot to count as a vote for the presidential electors nominated by the Republican Party.

The decisions of the courts of this State clearly establish that in writing in the names of the candidates it is only necessary that the surnames of the candidates be written in if the identity of the person for whom the voter wishes to vote can be ascertained from the surname alone. Further, the decisions establish that it is not necessary that these names be spelled correctly. So long as the intent of the voter to vote for a particular candidate is indicated, that intention should not be thwarted, and the votes should be counted for the candidates for whom the voter has indicated he desires to vote.

In Johnston v. Peters, 260 S.W. 911 (Tex. Civ. App. 1924, error dism.), the court stated:

> "Some voters had difficulty in correctly writing Johnston's name in the ballot, whereby it often occurred that his initials were either omitted entirely, transposed, or otherwise incorrectly given, or the name 'Johnston' misspelled. The trial court, however, counted all such ballots for Johnston, except where the 'first or distinctive initial' was incorrectly given. Of this excluded class there

> were 17 ballots, and we are called upon to decide if those should also have been counted for Johnston. It is the purpose of the law to give effect to the intention of the voter, where that intention is clearly determined; and the rule now is that, where only one man of a particular name is a candidate for an office, all ballots will be counted for that candidate when there is a clear relation between the appearance or sound of the surname written in and that of the candidate. McCrary, Elec. § 528 et seq.; 20 C.J. § 190, p. 160. Appellant was the only candidate for the office of sheriff who bore the name 'Johnston,' or any similar name, and he and Peters were the only candidates for that office. And where the voter wrote into the appropriate place on the ballot the name 'Johnston,' or any other name having a similar appearance or sound, the presumption is that the voter was voting for the candidate and not some one else, notwithstanding the name was misspelled or wrong initials were given. In pursuance of this conclusion, we have assigned to Johnston 17 votes, which were counted by the court below as 'no votes'. . ."

For similar holdings in other jurisdictions, see Keenan v. Briden, 45 R.I. 119, 119 Atl. 138 (1922); Cray v. Davenport, 333 Ill. 375, 164 N.E. 825 (1928), and cases cited therein.

We believe that the effect of these cases is that the voter may, when he desires to write in the name of Eisenhower and Nixon in the Democratic column in place of the names of Stevenson and Sparkman after following the procedure discussed above, write in only the surnames Eisenhower and Nixon, as it is inconceivable that the identity of the persons for whom the vote was intended could be doubted.

In addition to the cases discussed above, the courts have many times decided that it is not required that the surname written in on a ballot be spelled properly so long as the intention of the voter to vote for a particular candidate is apparent from what has been written in. The question of misspelling the surname of a write-in candidate was presented to the court in Wright v. Marquis, 255 S.W. 637 (Tex. Civ. App. 1923), and in holding that a proper spelling was not essential the court stated:

> "F. M. Galloway voted ballot No. 16, and erased the printed name of C. B. Wright and wrote thereunder the name 'A. R. Maruuis.' We think it clear that it was the intention of the voter to cast his ballot for A. R. Marquis. It was shown that there were only two candidates

> for the office of commissioner of precinct No. 4, and no doubt can exist that the voter intended to vote for one of them, and the misspelt name indicates the person desired for the office. We think the ballot was properly counted for A. R. Marquis. The ballot is indicative of the will of the voter. The law does not require that it should be accurately or nicely written, or that the name of the candidate voted for should be correctly spelled. If the will and desire of the voter can be ascertained from the ballot, and no law is infracted, the ballot should be given effect."

Applying this general rule to the situation presented in this opinion, it is seen that under the decisions in Texas there is no requirement that the surname of the candidate written in must be correctly spelled.

In view of the foregoing, we believe that a write-in vote for Eisenhower and Nixon, using only the surnames of those candidates, should be counted as a vote for Dwight D. Eisenhower and Richard M. Nixon, the candidates for President and Vice-President of the Republican Party, since those are the only candidates for President and Vice-President having those surnames. It is immaterial that the surnames are misspelled so long as from what is written on the ballot it can be determined for what candidates the voter intended to cast his ballot.

As stated at the outset of this opinion, a different rule applies to write-in votes where voting machines are used. The rules we have stated above in answer to your first three questions apply only to voting by paper ballots.

With respect to voting machines, the manner of casting write-in votes is prescribed in Section 16 of Section 79 of the Election Code (Sec. 16, Art. 7.14, Vernon's Election Code) as follows:

> "Sec. 16. Voting for Person Whose Name Does Not Appear on the Ballot. Ballots voted for any person whose name does not appear on the ballot shall be designated 'irregular' ballots, but such ballots shall be valid and shall be counted as though they had been voted on the voting machine. Should a voter desire to vote for some person for an office whose name does not appear on the ballot, such person shall write the name of the person for whom he desires to vote on the roll of paper provided and designated for such purpose and such ballot shall be counted and included in the canvass officially made from that precinct, but no irregular ballot shall be cast or counted for any person whose name shall appear on the voting machine."

We think it clear from the wording of the above statute that with respect to voting machines the names of candidates appearing on the machines cannot be written in. The express prohibition against counting such write-in votes makes this statute mandatory. The reason for making such a prohibition is that otherwise it would be possible for a voter to vote twice for the same candidate -- once on the voting machine and again on the irregular ballot. Therefore, with respect to voting machines, we believe that questions 1, 2, and 3 should be answered in the negative. Where he is casting his ballot on a voting machine, a voter who desires to vote for Eisenhower and Nixon must vote for these candidates in the space indicated on the printed ballot on the face of the machine.

SUMMARY

Voters using paper ballots in the 1952 general election may write in the names of Dwight D. Eisenhower and Richard M. Nixon, the nominees of the Republican Party for President and Vice-President, in the write-in column provided on the ballots, and such votes will be counted for the Republican Eisenhower-Nixon presidential electors.

Voters using paper ballots may strike out the names of the Democratic nominees and write in their place on the Democratic ticket the names of Eisenhower and Nixon, and such votes will be counted for the Republican Eisenhower-Nixon presidential electors.

Similar procedures may be followed in voting for the presidential and vice-presidential nominees of any other political party.

A voter must write in the names of both the candidate for President and the candidate for Vice-President nominated by the same party in order for his ballot to be counted. However, only the last name of the candidates is sufficient and their names do not need to be spelled correctly if the intention of the voter can be ascertained from the names as they are written on the ballot. For instance, a write-in vote for "Stephenson and Sparkmen" should be counted for Adlai E. Stevenson and John J. Sparkman. Likewise, a vote for "Izenhower and Nixen" should be counted for Dwight D. Eisenhower and Richard M. Nixon.

A voter who is casting his ballot on a voting machine may not cast a write-in vote for any candidate whose name appears on the voting machine. Where voting machines are used, voters in the 1952 election who desire to vote for Eisenhower and Nixon must vote for these candidates in the space indicated on the printed ballot on the face of the voting machine.

Yours very truly,

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